

Before the  
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

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MAR 15 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Closed Captioning and Video Description  
of Video Programming

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MM Docket No. 95-176

To: The Commission

COMMENTS OF THE A&E TELEVISION NETWORKS

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## **SUMMARY**

In implementing the video programming accessibility provisions of the recently-signed Telecommunications Act, the Commission should rely heavily on both its own regulatory experience in video captioning as well as Congress' recognition of the economic realities that affect the creation of new programming. To balance increased accessibility with the economic factors involved in creating original programming, the Commission should allow market incentives to guide the development of closed-captioned programming.

The Commission should continue its policy of fostering a public-private partnership to develop a self-sustaining closed-captioning system that does not deter original programming. Such an approach has proven highly successful in over-the-air broadcasting, leading to the closed-captioning of virtually all prime time programming, and has begun to operate to similar effect in the cable context as well. As part of this trend, A&E Television Networks has been increasing its captioning for original programming.

Cable programming networks, particularly those that seek to produce high-quality original shows, operate with proportionately smaller programming budgets than large broadcast networks or producers of shows for premium channels. Congress recognized these facts in Section 305 of the Telecommunications Act, and directed the Commission to avoid imposing economic burdens on programmers that would adversely affect the overall availability of programming. Accordingly, it imperative that the Commission adopt policies tailored to the economic needs of cable programmers.

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**COMMENTS OF THE A&E TELEVISION NETWORKS**

A&E Television Networks ("the Company"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submits these Comments in response to the Commission's *Notice of Inquiry*, FCC 94-484 (rel. Dec. 4, 1995) (the "*Notice*"), and also in response to the video programming accessibility provision of the Telecommunications Act of 1996 ("Telecom Act"), Pub.L. 104-104, 110 Stat. 56 § 305 (1996). 1/ The *Notice* and the Telecom Act recognize the importance of closed captioning as the number of hearing-impaired viewers has expanded. As experience and data indicate, the Commission's existing policy of using market forces and voluntary efforts to promote the use of closed-captioning for television programming has proven to be an effective way to reach this audience.

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1/ The Commission intends that the comments filed in this proceeding are to be used to satisfy the inquiry mandated by the Telecom Act. *Order*, FCC 96-71 (rel. Feb. 27, 1996).

This experience, as well as the legislative history of Section 305, suggest that the Commission must balance the goal of maximized access with the potential consequences of captioning requirements on network operations and the ability of cable networks to produce original programming.

The Company is a cable programmer that is neither owned nor controlled by any cable operator. It offers both the A&E Network ("A&E"), an established cable network, and a newly-launched service, The History Channel. A&E is currently delivered to more than 66 million cable households throughout the country via cable, TVRO, MMDS, DBS, and SMATV distribution systems. It features critically acclaimed original entertainment programming, including the series BIOGRAPHY®, mysteries, dramatic programs and specials. Over 80 percent of A&E's prime time schedule consists of original productions. The high quality, original programming offered on this network has earned A&E more CableAce Awards than any other basic cable network.

Given the success of A&E and the extraordinary interest expressed by television viewers for a network devoted to historical subjects, 2/ the Company launched The History Channel on January 1, 1995. The History Channel is a unique, high-quality programming service featuring historical documentaries,

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2/ Out of the non-cable subscribers who are most likely to subscribe to cable, the highest number (47 percent) indicated an interest in The History Channel, according to an independent 1994 Beta Research Cable Non-Subscriber Study.

movies and miniseries placed in historical perspective. Like A&E, the programming on The History Channel is available to distributors at a low cost.

As a provider of both established and brand-new cable programming services, the Company has a substantial interest in ensuring that accessibility is balanced by maintaining opportunities for creative programming. The Company is dedicated to ensuring that its programming becomes more available to all Americans. It also is committed to providing high quality original programming. The Commission's experience with closed captioning as well as economic reality indicates that it may not be possible in the near term to satisfy both goals, but that there must be a balance between the two.

**I. CONSISTENT WITH ITS EFFECTIVE PAST PRACTICES AND POLICY GOALS, THE FCC SHOULD CONTINUE IN ITS EVEN-HANDED APPROACH TO THE VIDEO CAPTIONING MARKETPLACE.**

The *Notice* sought comment on a broad range of topics, including (1) the current availability of closed captioned programming; (2) explanations for the difference in amount of captioning of cable programming as opposed to broadcast programming; (3) cost of captioning; and (4) market incentives for captioning.

Section 305 of the Telecom Act -- which was signed into law on February 8, 1996, after the *Notice* was promulgated -- requires an FCC inquiry regarding the level at which video programming is closed captioned, and provides additional guidance to the Commission in conducting this inquiry.

**A. Section 305 of the Telecommunications Act**

Section 305(a) of the Telecom Act directs the Commission to ascertain the status of closed captioning of video programming, to complete an inquiry within 180 days of the enactment date of the Act, 3/ and to submit a report on the results to Congress. Furthermore, the Commission must prescribe any necessary regulations within 18 months of the enactment date, and must include an implementation schedule for captioning. 4/ These regulations must contain accountability criteria to ensure that video programming providers or owners “maximize the accessibility” of programming first published prior to the effective date of such regulations, and to ensure that programming first published subsequent to the effective date is “fully accessible.” 5/

Congress made clear that the accountability criteria are subject to an economic analysis in which certain categories of programming are exempt. Specifically, programming providers and owners of programs are exempt where pre-existing contracts do not require captioning. Also, the Commission may exempt by regulation providers or owners of programs, classes of programs, or services where requiring closed captioning would be “economically burdensome.” Finally, providers

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3/ President Clinton signed the Telecom Act on February 8, 1996.

4/ Telecom Act §§ 305(a),(c)

5/ Telecom Act § 305(b).

or owners of program services may petition the FCC for an exemption in a particular case if compliance would create an “undue burden.” 6/

The discretion given to the Commission in Section 305 is consistent with the FCC’s past practices. In asserting its jurisdiction in this area over the past 25 years, the FCC has cautiously moved to maximize programming accessibility. Key aspects of this approach have been its acknowledgment of the economic realities affecting programming, as well as a partnership involving public and private funding.

In developing rules to implement Section 305 of the Telecom Act, the FCC should be guided by its successful past practice as well as the Act. In particular, the Commission should recognize the effectiveness of its effective past practices of encouraging voluntary captioning and permitting consumer preference to dictate which programs ought to be captioned.

**B. The Partnership Between Private Industry and Government Has Proven to be a Fair and Efficient Mechanism to Balance Accessibility with the Important Goal of Fostering Programming Diversity.**

**1. The FCC Has Exercised its Discretion so as to Maximize Voluntary Efforts**

The Commission’s captioning policies historically have evolved from a variety of statutory bases. The Communications Act of 1934 provides an organic

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6/ Telecom Act § 305(d).



source of the FCC's jurisdiction over broadcast programming in general, by delegating to the FCC powers pursuant to the public interest, including the power to make rules and regulations not inconsistent with this Act. 7/ In assessing the FCC's interpretation of the public interest standard, the Supreme Court ruled that the agency acted within its discretion in declining to impose a heightened captioning requirement on public broadcast licensees than on commercial licensees. 8/ Importantly, the Court noted that the FCC was not empowered to enforce directly other federal laws or to impose direct obligations, but that it could take into account a licensee's overall service to the hearing impaired as part of its general public interest assessment. 9/

Anti-discrimination legislation has been cited as one basis supporting the FCC's public interest calculus in its policies regarding closed captioning. 10/ Additionally, other statutes such as the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), 11/ which allows government

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7/ The Communications Act of 1934 §§ 1, 303.

8/ *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508-12 (1983).

9/ *Id.* at 510-11.

10/ See Rehabilitation Act of 1973 § 504, as amended, 29 U.S.C.A. § 794 (prohibiting recipients of federal financial assistance from discriminating against otherwise qualified handicapped persons); Americans with Disabilities Act of 1990 § 402, 47 U.S.C. § 611 (requiring closed captioning for public service announcements).

11/ Pub.L. No. 102-385, 106 Stat. 1460 (1992).

regulation of equipment for the hearing impaired, and the Television Decoder Circuitry Act of 1990 ("TDCA"), 12/ which provides the hearing impaired with equal access to programming by requiring televisions to be equipped with caption decoding circuitry, further underscore some of the general public interest values inherent in captioning.

These laws have emphasized a government-private partnership in maximizing programming accessibility. For example, the text and legislative history of the TDCA stress private investment and a self-supporting captioning industry as the linchpins of the government policy. As the TDCA's findings declare, "the availability of decoder-equipped television sets will significantly increase the audience that can be served by closed-captioned television, and such increased market will be an incentive to the television medium to provide more captioned programming." 13/ The Senate Report to the bill noted that this incentive will ensure a self-sustaining captioning service, 14/ and the House Report stated that the legislation "will enable the widest possible audience to benefit from closed captioning technology, while ensuring that broadcasters and others have incentives to invest in and provide greater amounts of captioned programming." 15/ Similarly,

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12/ Pub.L. No. 101-431, 104 Stat. 960 (1990).

13/ TDCA § 2(9).

14/ S. REP. NO. 393, 101st Cong., 2d Sess. 190, 1990 U.S.C.C.A.N. 1438, 1432.

15/ H.R. REP. NO. 767, 101st Cong., 2d Sess. 1990, 1990 WL 200486 at \*9.

the 1992 Cable Act stated that Congress' policy is to "promote the availability to the public of a diversity of views and information through cable television," and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability." 16/

Through prior decisions, the FCC has taken the same approach. In 1970, the Commission issued a Public Notice suggesting that broadcasters accompany oral announcements of emergencies with visual announcements, and stated that it would "observe developments in this area in the near future, and if the situation does not develop satisfactorily it may be necessary to begin rule making looking toward the adoption of minimum requirements." 17/ In revisiting this issue over the years, the FCC imposed a captioning requirement for emergency broadcasting, but did not extend captioning obligations to other programming. 18/ The decision not to issue regulations beyond the emergency broadcast context is not

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16/ 47 U.S.C. §§ 521(1),(2).

17/ *The Use of Telecasts to Inform and Alert Viewers With Impaired Hearing*, 26 F.C.C.2d 917, 917-19 (1970).

18/ *See Report and Order, In the Matter of Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 F.C.C. 2d 18 (1976); *see also Report and Order, In the Matter of Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, 63 F.C.C. 2d 318 (1976); *Memorandum Opinion and Order, In Re License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California*, 69 F.C.C. 2d 451 (1978).

only condoned by Congress, 19/ but also reflects an awareness that programmers' responsiveness to the hearing-impaired community has increased over time.

## **2. DOE Grants Promote Closed Captioning**

The grant program run by the Department of Education ("DOE") provides an excellent vehicle for the government to foster closed captioning because it reflects the degree of governmental commitment to captioning, and channels funds directly those who wish to caption programming. In order to promote the general welfare of individuals with hearing or visual impairments, the DOE operates the Educational Medical Research, Production, Distribution, and Training Program. 20/ In carrying out this program, the Secretary of DOE establishes preferences for grant applications, 21/ and in recent years has prioritized awards for applications in the following four areas of activity: (1) national news and public information programs; (2) movies, mini-series, special programs, and other

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19/ See *Amendment of Part 15 of the Commission's Rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990*, 6 FCC Rcd. 2419, 2434 (1991) ("We have focused on the fundamental objectives of the Decoder Act: to significantly reduce the cost to consumers to receive closed captioning, make closed captioning more widely available, and create market incentives for broadcasters to invest in and provide more closed-captioned programming.").

20/ See 20 U.S.C. §§ 1451, 1452.

21/ See 34 C.F.R. § 75.105.

programs broadcast during prime-time; (3) children's programs; and (4) syndicated television programs. 22/

By granting these awards, the Secretary can rely on the analysis and expertise of the DOE to target the programming most sought after by the hearing impaired community. 23/ The Secretary has found that this program-based approach has been effective in efficiently allocating resources to the areas with the greatest captioning demand. 24/ This program provides a valuable service, distributing over \$7.9 million in annual awards for captioning to entities that might not otherwise have the wherewithal to provide closed-captioned programming.

Significantly, the existence of this program has increased the incentives for captioning without the need to resort to specific mandates. In addressing comments suggesting an increased priority on persuading networks and stations to assume greater responsibility for captioning costs of sports programming, the Secretary of Education noted:

The Secretary agrees that increased private sector funding of closed-captioning is important. In fact, since 1980 the portion of captioning paid for through non-federal support has grown significantly, particularly in prime-time news and

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22/ See, e.g., *Notice of Proposed Priorities*, 60 Fed. Reg. 56192 (Nov. 7, 1995); *Notice of Final Priorities*, 61 Fed. Reg. 4168 (Feb. 2, 1996).

23/ The Secretary has expressed a desire to emphasize consumer preference. See, e.g., *Notice of Final Funding Priorities for Fiscal Year 1994*, 58 Fed. Reg. 54434, 54434 (1993).

24/ *Notice of Final Priorities*, 61 Fed. Reg. 4168 (Feb. 2, 1996)

sports programming on major broadcast networks. The Secretary believes that as the implementation of the Decoder Circuitry Act increases the number of homes with decoders, this trend is likely to accelerate. Therefore, the Secretary believes there is no need at this time to add such a focus to the language of this priority. 25/

### **3. The Commission's Captioning Policies Have Been Effective**

Increases in the amount of programming closed captioned by broadcast networks exemplify the effectiveness of the industry-government partnership in increasing access to the hearing impaired. Completely funded by federal dollars initially, closed-captioned television started officially in 1980. 26/ Congress recently acknowledged "that there has been a significant increase in the amount of programming that has been closed captioned since the passage of the Television Decoder Circuitry Act of 1990. In particular many network programs aired during prime time are captioned." 27/

Only 16 hours of prime time television were captioned in 1981. Now, all prime time programming, Saturday morning children's programs, and a variety of daytime and late night programs are captioned. Of the current captioning

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25/ Notice of Final Funding Priorities for Fiscal Year 1994, 58 Fed. Reg. 54434, 54435 (Oct. 21, 1993)

26/ Notice of Final Funding Priorities for Fiscal Year 1994, 58 Fed. Reg. 54434, 54439 (Oct. 21, 1993).

27/ H.R. REP. NO. 204, 104th Cong., 1st Sess. (1995)

available, DOE grants approximately 40 percent, the networks provide approximately 30 percent, and corporate advertisers, foundations, and contributions provide for the remaining 30 percent. 28/

**C. Section 305 Perpetuates the Private-Public Partnership By Directing the Commission to Avoid Economically Burdensome Regulations.**

Section 305 creates express authority for FCC jurisdiction over closed captioning, and it also codifies the same balancing factors that the Commission has weighed in the past when considering the imposition of captioning requirements. The legislative history of the video accessibility provision of the Telecom Act repeatedly emphasizes the need to balance the benefits of increased accessibility against economic realities. The House of Representatives Conference Committee recognized “that the cost to caption certain programming may be prohibitive given the market demand for such programs and other factors,” and went on to note that “the Committee does not intend that the requirement for captioning should result in . . . previously produced programming not being aired due to the cost of the captions.” 29/ The Conference Report also recognized this tension by directing the Commission to “balance the need for closed captioned programming against the

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28/ Notice of Final Funding Priorities for Fiscal Year 1994, 58 Fed. Reg. 54434, 54439 (Oct. 21, 1993).

29/ H.R. REP. NO. 204, 104th Cong., 1st Sess. (1995).

potential for hindering the production and distribution of programming.” 30/ Based on this congressional endorsement of its past practices, the Commission should continue to permit market pressures to move program distributors toward “full accessibility” at a pace that necessarily takes into account the viability of captioning.

**II. A&E HAS BEEN INCREASING AND WILL CONTINUE TO INCREASE THE AMOUNT OF CLOSED-CAPTIONED PROGRAMMING IT PROVIDES.**

**A. Growth of Captioned Programming on A&E**

Although cable programming networks are a nascent industry compared with broadcast networks, they have nevertheless begun to provide captioned programming in recent years. The cable networks’ early and voluntary entry closed captioning indicates a commitment to captioning and a recognition that captioned programming is becoming the norm. This early trend toward captioned programming among cable networks forecasts a much more rapid expansion of captioning among cable networks than was experienced in the broadcast industry. To a certain extent, the reliance by cable networks on syndicated programming will lead to increased levels of captioning overall. Also, the Department of Education’s grant program has had a positive effect, making possible the captioning of 134 hours of captioning for *The Avengers* on A&E in 1990-91, and for 125 hours for *The*

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30/ Telecom Act, Joint Explanatory Statement of the Committee of Conference at 183.



*Rockford Files* in 1992. Such previously captioned programming will play a smaller role for A&E over time, however. Approximately 80% of A&E's weekly prime-time schedule in 1996 will consist of original programming.

At the same time, the general expansion of the market for captioning has led to an increase in captioning for A&E's original programming. As the following list indicates, A&E has been increasing the number of shows it has captioned either on its own or with partial financing from the DOE or another sponsor. Since 1990, A&E has provided the following series, specials and mini-series in captioned form: *Dinosaur!* (1990-91); *Churchill* (1991); *Caroline's Comedy Hour* (Episode LEF 759) (1992); *Locomotion* (1993-94); *Thicker Than Water* (1993-94); *GM Playwrights Theater* (Various); *Circus! 200 Years of Circus in America* (1995); *Who Wrote the Bible?* (1995); *Jesus: His Life* (1995); *America's Castles: The Age of Invention* (1995); *Naked News* (1995); *Charlemagne* (The History Channel) (1995); *The Men Who Killed Kennedy: The Truth Shall Set You Free* (1995); *Pride & Prejudice* (1996); *Floating Palaces* (1996); *Where Are All the UFOs* (1996). The programs listed above indicate that the rate at which programming is captioned is increasing. In fact, the number of hours of captioned programming aired in the first two months of this year exceeded the amount of original programming captioned on A&E in any previous year until 1995. The total for 1996 is expected to surpass by far that for 1995. This trend is expected to continue.

**B. Economics of Captioning Cable Network Programming.**

In the Company's experience, the Commission's estimates of the cost of captioning, as listed in the *Notice*, appear to be accurate. 31/ The initial captioning of a show costs approximately \$1,600 per hour, plus approximately \$300 per hour in encoding costs. Reformatting a previously captioned product runs from \$350-\$450 per hour, plus encoding, which varies depending on the editing done to the original program. Such costs are likely to decline as captioning becomes more widespread. Rates for live captioning are somewhat lower, at \$900 to \$1,200 per hour. However, A&E airs few live programs -- and The History Channel has aired none so far -- so the Company generally does not benefit from the lower cost of captioning live programming.

However, raw cost figures demand different policy responses, depending on the economic context in which they are applied. Cable networks have only recently begun to produce original programming, a development that should be encouraged, not stymied by the imposition of costly production requirements. The economics driving the cable industry differ significantly from those of broadcast network television. Cable networks could not survive on advertising revenue alone, but must depend on support from their affiliates. The ratings achieved by cable networks such as A&E -- which averaged a 1.0 prime-time rating in 1995 -- are on

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31/ See *Notice* at ¶ 18.

an entirely different scale from broadcast networks. <sup>32/</sup> Cable networks simply cannot support the same overhead costs as a broadcast network like NBC, which has a standard average rating of 12.1. <sup>33/</sup> This difference is crucial, since even five years ago, the Commission recognized that a single ratings point may be worth \$100 million in advertising revenue to a broadcast network over the course of a season. <sup>34/</sup> Fairness, as well as the mandate of Section 305, demands that captioning costs should not be considered in the abstract, but assessed in relation to the audience served.

The differences in scale between broadcast and cable networks are also evident in overall programming budgets. For example, the cost per prime time hour for a broadcast network is approximately \$1 million. This means that the four over-the-air networks spend approximately \$64 million on prime time programming each week. <sup>35/</sup> In addition, prime time programming license fees for the networks are high and are increasing. In the 1994-95 television season, for example, the network programming cost per rating point were as follows: ABC (\$49,410); CBS (\$53,500);

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<sup>32/</sup> *USA Makes It Six in Row*, Broadcasting & Cable, Jan. 1, 1996, at p.39.

<sup>33/</sup> *People's Choice: Ratings According to Nielsen, Feb. 5-11*, Broadcasting & Cable, Feb. 19, 1996, at p.24

<sup>34/</sup> *In the Matter of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094,3182 (Sikes, C., dissenting) (1991).

<sup>35/</sup> Paul Kagan Assoc., *TV Program Stats* (Issue #73, September 30, 1994).

NBC (\$48,682); and Fox (\$68,740). The average program cost per ratings point for the networks was \$54,377 -- a 13.9 percent increase over the previous year. 36/

Obviously, the figures demonstrate that the network broadcasting business is based on an entirely different scale and economic structure than applies to a cable programming network. The four broadcast networks, for example, spend more on prime time programming in two weeks than does a cable network the size of A&E or The History Channel in the course of a year. Moreover, such costs are covered by much greater revenues, because of the differences in ratings and advertising rates. Accordingly, the economic effect of captioning requirements would be very different for a cable network than for a broadcast network.

The text and legislative history of the Telecom Act make clear that the Commission must take these differences into account in making any necessary rules. As explained above, Congress has explicitly stated that the regulatory policy implemented by the Commission should not be economically burdensome. Cable television is just beginning to emerge as a significant producer of original programming. 37/ Cable networks, with considerably smaller margins than

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36/ Paul Kagan Assoc., *TV Program Stats* (Issue #83, July 27, 1995).

37/ The Supreme Court similarly had observed that the Commission's public interest view of captioning requirements should be tempered by the fact that some program providers may air programs "that lack the mass appeal required for broadcast on network affiliates." *Gottfried*, 459 U.S. at 512 n.19. The Court in that case was referring to public broadcast stations, but the public interest principles at issue also apply here.

broadcast networks, should not be discouraged from developing original programming because of captioning costs.

### **III. POLICY IMPLICATIONS FOR IMPLEMENTATION OF SECTION 305**

Section 305 expressly codifies the Commission's historic approach toward captioning issues that recognizes the economic concerns affecting different programming services. Thus, while Sections 305 (b) and (c) empower the Commission to establish rules for such captioning to be included in video programming, and to implement an "appropriate schedule" for compliance, subsection (d) establishes a series of exemptions. In particular, Section 305(d)(1) calls upon the Commission "by regulation" to exempt from any captioning schedule "programs, classes of programs, or services" for which "closed captioning would be economically burdensome to the provider or owner of such programming."

#### **A. Blanket Exemptions Adopted Pursuant to Section 305(d)(1) Should Take into Account the Economic Needs of Cable Programmers**

The House Report on this provision identified several factors to be used in establishing such exemptions under Section 305(d)(1), including (but not limited to): (1) the nature and cost of captioning; (2) the impact on operations of the program provider, distributor or owner; (3) the financial resources of the program provider, distributor or owner; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; (7) the existence of

alternative means of providing access to the hearing impaired, such as signing. 38/

This interpretation of the provision was adopted by the Conference Report. 39/

The statutory factors of Section 305(d)(1), coupled with the economic circumstances that apply to cable networks (as distinguished from broadcast networks), point to the need for a blanket exemption for classes of programs or services, such as cable networks, that lack sufficient audience reach to justify the cost of universal captioning. Although it would be premature to suggest a benchmark for such a rule at this early stage of the proceedings, the Commission should carefully consider the comparative ratings data and revenues of the various networks in establishing any rule. Thus, the Commission should consider a rule that exempts networks that fail to achieve a specified audience reach threshold, on an annualized basis.

This is not to suggest that cable networks will not move forward with captioning. The historical trends and market developments demonstrate otherwise. At the same time, the economic considerations written into Section 305(d)(1) counsel against adopting an inflexible benchmark that would apply across the board to the largest broadcast networks and the smallest newly launched cable network.

Another factor that the FCC should take into account is the effect of captioning requirements on newly launched networks. The FCC has acknowledged

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38/ H.R. REP. NO. 204, 104th Cong., 1st Sess. 115 (1995).

39/ Conf. Rep. 104-458, 104th Cong., 2d Sess. 183-184 (1996).

the special needs of new networks in crafting rules under the Cable Act of 1992. For example, the going-forward rules were modified specifically to ease the burden on establishing new networks. 40/

There is a sound economic basis for such an approach by the FCC. Even successful new networks that benefit from good name recognition and other advantages take almost five years to break even after launch. 41/ Such long lead times before costs are recovered are understandable, given the high cost of launching a network. The start-up costs of launching a stand-alone cable network have been estimated at \$100 million. 42/ The Commission issued its going forward rules in 1994 to address the daunting obstacles faced by new cable programming networks. Any policy created by the Commission must take into account the special needs of newly launched networks.

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40/ *In the Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd. 1226 ¶ 22 (1994) (the “going-forward rules”) (“We are concerned, based on the comments filed by operators and programmers, that our current rules may not provide sufficient incentives for operators to expand capacity and provide new services to consumers.”).

41/ *See Programming Points*, Cable TV Programming, February 27, 1995 at 3.

42/ Of the cable network CEOs who are in the process of launching a new network, most anticipate that the break-even investment point is around \$90 million or \$100 million. *New Networks Square Off*, Multichannel News, Nov. 10, 1995, at p4.

**B. Individual Hardship Exemptions Adopted Pursuant to Section 305(e) Should be Tailored to the Economic Needs of Cable Programmers.**

Once a rule and compliance schedule is established, the Commission should also establish guidelines for what circumstances constitute an “undue burden” pursuant to the waiver provisions of Section 305(e). Congress defined this term as “significant difficulty or expense,” and set forth the following factors to be included in determining whether compliance with requirements in a particular case would result in an undue economic burden:

- (1) the nature and cost of the closed captions for the programming;
- (2) the impact on the operation of the provider or program owner;
- (3) the financial resources of the provider or program owner; and
- (4) the type of operations of the provider or program owner. 43/

It is important that the Commission acknowledge the differences between the threshold exemption for captioning requirements included in Section 305(d)(1), and the more individualized process described in Section 305(e), even though some of the economic factors to be considered under each section are similar. Based on its historic public interest policies, the Commission should find that discrepancies of scale between very large programming producers and medium and small sized programming producers dictate that flexibility must be incorporated into any

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43/ Telecom Act § 305(e).



implementation schedule for closed captioning. The Section 305(e) waiver provisions are reserved for instances in which an entity that comes within the rule can be excused in a particular case.

Even though the purposes of the exemption and waiver provisions are somewhat different, many of the same economic factors identified above will be relevant. For example, whereas the costs of captioning may be the same regardless of whether the program appears on a broadcast network or a cable network, the relative burden to the program provider will be quite different. As noted above, the significant differences in scale and resources between broadcast and cable networks call for the Commission to apply its waiver policies in a way that acknowledges these differences. Moreover, unlike the established broadcast networks, new cable networks launch every year. The Commission's analysis of the economic burdens of potential captioning requirements must take this fact into account when considering a particular waiver request under Section 305(e).

## **CONCLUSION**

In following up on its own initiative and adhering to congressional guidance, the Commission should bear in mind that its ultimate goal is not just to make a greater quantity of captioning available, but also to increase the accessibility of quality, diverse video programming. Accordingly, the prudent course to reach this end is to continue the effective deployment of market